

# The Business Case for a Diverse Workforce

- ✓ **Bolsters Financial Performance** (McKinsey & Co: 35% more likely than non-diverse companies to be above the median financial performance in their respective industry)
- ✓ **Retention** (United Minds Report: 71 % agree that it is important to work for an organization that values DE&I; Millennials 83% more engaged in inclusive work environments)
- ✓ **Better Services, Products, and Innovation** (Forbes: diverse teams make better decisions 87% of the time)
- ✓ **Better Productivity/Employee Engagement** (Gallup estimates \$350 billion lost in US due to lack of employee engagement)
- ✓ **Opens New, Untapped Markets** (HBR: 70% more likely than non-diverse peer companies)

# Federal and Utah Antidiscrimination Laws

## Title VII

Sex, sexual orientation, gender (pregnancy under PDA), gender identity, race, ethnicity, color, religion, national origin

## Utah Antidiscrimination Act

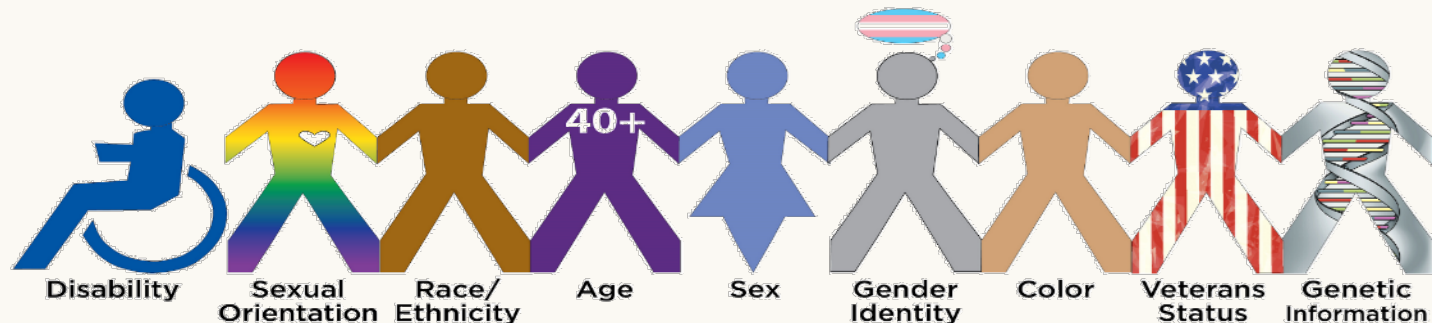
Same plus, disability, pregnancy, age

## Age Discrimination in Employment Act

Age 40 and older

## Americans with Disabilities Act

Individuals with disabilities, regarded as disabled, may need to accommodate



# SCOTUS Decision

## *Students for Fair Admissions v. Harvard*

### KEY TAKEAWAYS

Affirmative action prohibited in Title VI/higher education

Protected category type information cannot be used in admissions decisions

**\*\*Does not affect affirmative action requirements for government contractors under the Office of Federal Contractor Compliance Programs**

Does not apply to private sector employers. Title VII applies in employment

Race-based decision-making by employers is already presumptively illegal under Title VII

**BUT: Justice Gorsuch in concurring opinion directly correlates and discusses the similarities between Title VI and Title VII**

Reasonable to assume this logic will find its way into Title VII cases

# EEOC Response



“The decision does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.”

**EEOC Chair Charlotte A. Burrows, 6/29/23**

**\*But Andrea Lucas, EEOC Commissioner, specifically countered that the decision should be a “wake-up call” to employers to review the “lawfulness” of corporate diversity programs**

# Aftermath and Political Landscape

- SCOTUS Denial of Writ of Certiorari in *Coalition for TJ v. Fairfax County School Board* letting stand admissions criteria because it was “race-neutral” (included waiving application fee, eliminating standardized testing, guaranteed entrance to top students from each school in the district, which increased diversity)
- Proliferation of legislation targeting “woke” diversity, equity and inclusion programs including this session in Utah, HB261 prohibiting all forms of DEI in Utah state government and schools
- U.S. Senator Tom Cotton writes to Fortune 100 companies and law firms stating: “Congress will increasingly use its oversight powers—and private individuals and organizations will increasingly use the courts—to scrutinize the proliferation of race-based employment practices”
- 13 Democratic Attorneys General responded days later stating unequivocally that corporate DEI programs are lawful and serve important business purposes

# The Remedial Justification

SFFA/SCOTUS did not appear to impact or eliminate the “Remedial Justification” under Title VII

Race-conscious voluntary programs, to be lawful under Title VII, must necessarily serve a “remedial purpose” consistent with Title VII’s goals

\*\*In the past, an employer could address a manifest historical imbalance in the workforce concerning an underrepresented group, through a “narrowly tailored” measure so long as it does not “unnecessarily trammel” the rights of other groups—for as long as necessary to rectify the imbalance

# How to Implement: Legal Overview



# Permissible in Recruiting and Hiring

- Increase the applicant pool—different hiring locations, community activities, Campus outreach
- Rooney/Mansfield rule in hiring
- “Blind” applications
- Training—we tend to hire those we know; those we know tend to be/look like us
- Race-neutral criteria—recruiting different law schools, consider criteria
- Pay equity (conduct an audit to uncover inequitable pay practices)
- Proper interviewing questions
- \*\*Again, overinclusive, not based on protected categories; or, directly related to correcting an historical imbalance



# Retention

Should generally be all-inclusive and not protected categories

- **Mentoring and buddy programs for new hires**
- Retention/referral bonuses (over inclusive)
- **Affinity/employee resource groups (ERGs)**
  - Who is included? (Did we say “overinclusive” yet?)
- **Business/career development programs**
  - Trainings/speakers (self-promotion, networking, communications, organization, etc.)
- **In DEI committees and ERGs, have defined goals of positivity and defined agendas**
- **Ally networks and Sponsors**

**\*\*Invite Everyone and Allow All to Participate**